# STATE OF MICHIGAN

# COURT OF APPEALS

GLENN CASSANI,

Plaintiff-Appellant,

v

MEIJER, INC.,

Defendant-Appellee.

UNPUBLISHED
March 18, 2003

No. 240486
Macomb Circuit Court
LC No. 2001-001623-NZ

Before: Cooper, P.J. and Murphy and Kelly, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right the trial court's order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm.

## I. Basic Facts

After completing a merchandise exchange at defendant's store, plaintiff stopped to reach for a magazine from a rack in the vestibule area of the store. As he reached for the magazine, he was struck in the head by an automatic door. Plaintiff filed a complaint alleging premises liability.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) arguing that the condition resulting in plaintiff's injury was open and obvious. Specifically, defendant argued that the normal operation of the automatic door was obvious, plaintiff walked through the automatic door moments before it struck him, and there were signs on the door stating that it was automatic.

In his response to defendant's motion, plaintiff argued that the condition was not open and obvious. Plaintiff argued that he may not have entered the automatic door that struck him because there was another, non-automatic door that he could have used. Alternatively, plaintiff argued that the condition presented an unreasonable risk of harm because the vestibule area was narrow and the magazine rack was placed where a customer's attention would be diverted from the danger of the door opening.

In reply, defendant argued that plaintiff's failure to observe the condition does not preclude it from being open and obvious. Defendant also pointed out that the door had "caution

automatic door" signs on both sides, the span of the door is marked by black mats, and there are guardrails on both sides of the door.[1]

The trial court granted defendant's motion finding that there was no genuine issue of fact as to whether the danger was open and obvious. The trial court noted that plaintiff's "exposure to automatic doors can not be seriously disputed" because he testified that he worked at defendant's Royal Oak store. The trial court also found that an average user or ordinary intelligence would discover and realize the danger presented by the normal operation of an automatic door. The trial court also found that the signs on the door, the railings, and the mats made the danger open and obvious. The trial court also found that plaintiff's attention would have been drawn to the danger because he would have had to reach past the railings to reach the magazines. The trial court also found that there was no evidence that there was an unreasonable risk of harm because the guardrails and the floor-mats would draw attention to the danger and away from the alleged distraction. The trial court also found that the evidence did not demonstrate that defendant either positioned the rack or knew or should have known that the condition existed.

After the hearing on the motion for summary disposition, the deposition of Timothy Nezeritis took place. In a motion for reconsideration, plaintiff argued that Nezeritis' deposition testimony established that defendant knew or should have known of the presence of the stand. The trial court denied plaintiff's motion for reconsideration.

## II. Standard of Review and Applicable Law

We review de novo a trial court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* at 120. Where a motion is made and supported under MCR 2.116(C)(10), an adverse party may not merely rest upon the allegations or denials of her pleading, but must set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4); *Maiden*, *supra* at 120-121. When this Court reviews a motion for summary disposition under MCR 2.116(C)(10), it considers the affidavits, pleadings, depositions, admissions and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* at 120.

In order to establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). The duty that an owner or occupier of land owes to a visitor depends upon the status of the visitor at the time of the injury. *Hampton v Waste Mgmt of Michigan, Inc*, 236 Mich App 598, 603; 601 NW2d 172 (1999). A visitor may be a trespasser, a licensee, or an invitee. *Id.* Here, it is uncontested that plaintiff visited defendant's store as an invitee. One who enters the

[1] In a supplemental brief, defendant alerted the trial court of the existence of a videotape of the incident. However, defendant noted that the video did not capture the entire incident, but only plaintiff's feet and then, after he was struck by the door, plaintiff sitting on a bench holding his head. Defendant presented the tape to the trial court for review.

land of another for a commercial purpose on an invitation that carries with it an implication that reasonable care has been used to prepare the premises and to make them safe. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597, 604; 614 NW2d 88 (2000).

An invitor owes a duty to his invitees to inspect the premises and make any necessary repairs or warn of discovered hazards. *Stitt*, *supra* at 597. Invitors are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). Rather, an invitor must warn of hidden defects but is not required to eliminate or provide warnings of open and obvious dangers unless the invitor should anticipate the harm despite the invitee's knowledge of it. *Id.* at 613, quoting *Riddle v McLouth Steel Products*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495-498; 595 NW2d 152 (1999). Whether a danger is open and obvious depends upon whether it is reasonable for the invitor to expect that an average user of ordinary intelligence would discover the danger after casual inspection. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995), citing *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). This test is an objective one, requiring us to consider whether genuine issues of material fact exist with regard to whether a reasonable person would foresee the "particular risk at issue." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

## III. Analysis

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because there was a genuine issue of fact as to whether the condition was open and obvious, whether the condition created an unreasonable risk of harm, and whether defendant had knowledge of the condition. We disagree.

The trial court correctly concluded as a matter of law that the particular risk at issue, that plaintiff would be hit in the head with the automatic door while reaching for a magazine, was open and obvious. An automatic door is not such a modern invention or unusual occurrence that it would take a person of average intelligence by surprise. Additionally, this particular door was accompanied, as such doors usually are, with warnings. The door had a sign that read "caution automatic door." There were guardrails on either side of the door indicating the extent to which it opened. Thus, aside from being a standard commonplace automatic door, the door was accompanied by two indications of possible danger.[2] Plaintiff's argument that he did not remember if he went through the door does not preclude the danger from being open and obvious because having gone through the door was not prerequisite to viewing these warnings. Additionally, although plaintiff admitted that he exited through an automatic door, he denied being able to recall (1) whether he walked through the door that struck him or (2) whether the door he walked through opened automatically for him. This does not create a genuine issue of fact.

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[2] Defendant also points out that there was a mat on the floor; however, we do not see how this provides any sort of warning.

Plaintiff also argues that even if the condition was open and obvious, there was a question of fact as to whether it presented an unreasonable risk of harm. "[I]f the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions." *Bertrand*, *supra* at 611. In *Bertrand*, the our Supreme Court held, "[W]here there is something unusual about the [condition] because of [its] 'character, location, or surrounding conditions,' then the duty of the possessor of land to exercise reasonable care remains." *Id.* at 617. Put another way, our Supreme Court stated more recently:

> Consistent with *Bertrand*, we conclude that, with regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create and unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001).]

Here, the evidence does not demonstrate that there were truly "special aspects" of the open and obvious condition that created a duty on defendant's part. The only evidence plaintiff cites, photographs of the scene, indicates that the area containing the magazine rack was narrow and there were advertisements on the wall near the magazine rack. From this, plaintiff argues that the area "[wa]s so narrow" that it was unreasonable to place a magazine rack there especially when the advertisements would divert the customers' attention. However, the photographs of the door area demonstrate that there was a usual automatic door in a usually shaped and sized entranceway. While the magazine rack was located in a narrow space next to the door, the guardrail marking the extent to which the door opened clearly indicated the danger posed by the opening door. The space was also wide enough and the danger of the door opening clear enough to allow an ordinarily prudent person to safely retrieve a magazine while avoiding danger.

Plaintiff also argues that the defendant intentionally placed the magazine rack and advertisements so to that people would look at them; however, there is no evidence supporting this assertion. Whether defendant intentionally placed these items or not, the evidence does not create a genuine issue of fact as to whether the condition created an unreasonable risk of harm.

Plaintiff finally argues that the trial court erred in granting defendant's motion, in part, on the grounds that defendant had no knowledge of the condition. Because there was no genuine issue of fact as to whether the condition was open and obvious or created an unreasonable risk of harm, defendant's knowledge of the condition is irrelevant.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly